DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

PLAINTIFFS: **Anthony Lobato**, *et al.*

and

PLAINTIFFS-INTERVENORS: **Armandina Ortega**, *et al.*

vs.

DEFENDANTS: **The State of Colorado**, *et al.*

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Attorneys for Defendants:
JOHN W. SUTHERS, Attorney General
NANCY J. WAHL, 31890*
First Assistant Attorney General
E-mail: nancy.wahl@state.co.us
ANTONY B. DYL, 15968*
Senior Assistant Attorney General
E-mail: tony.dyl@state.co.us
CAREY TAYLOR MARKEL, 32987*
Senior Assistant Attorney General
E-mail: carey.markel@state.co.us
NICHOLAS P. HEINKE, 38738*
Assistant Attorney General
E-mail: nicholas.heinke@state.co.us
JONATHAN P. FERO, 35754*
Assistant Attorney General
E-mail: jon.fero@state.co.us
ERICA WESTON, 35581*
Assistant Attorney General
E-mail: erica.weston@state.co.us

Office of the Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203
Telephone: (303) 866-2383
Fax: (303) 866-5671
* Counsel of Record

Case Number: 05 CV 4794

Div: 9

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF NON-EDUCATION APPROPRIATIONS AND TABOR PROVISIONS

SUMMARY OF THE ISSUES AND ARGUMENT

Plaintiffs move to exclude evidence and argument concerning "non-education" appropriations by the General Assembly and the TABOR amendment's revenue restrictions, arguing such would be irrelevant, confuse the issues, and waste time. (Pls.' Mot. *in Limine* at 1–2) Defendants disagree. Plaintiffs first put the TABOR amendment and the legislature's appropriations to other essential state services at issue through their initial complaint five years ago—allegations they have affirmed in each subsequent amendment. More recently in their expert disclosures, Plaintiffs confirm that evidence regarding TABOR and the legislature's many appropriations is a part of their case. Consequently, Plaintiffs themselves prove the evidence and argument they target for exclusion is relevant to the issues they bring before this Court.

Moreover, Plaintiffs' assertion of irrelevance is based on an erroneous view of the law. Under the governing rational basis standard and rules of constitutional harmonization, TABOR and all of the General Assembly's appropriations are facts of consequence that have a tendency to show the legislature has acted rationally when funding K–12 education. Plaintiffs' fear of unfettered discretion misses the mark, and their reliance on distinguishable out-of-state cases is unpersuasive. Because Plaintiffs injected TABOR and the General Assembly's appropriations into this case, they cannot be heard to complain that such evidence will waste time. Precluding such evidence would unfairly prejudice Defendants' effort to defend the legislature's education appropriations, particularly given that the School Finance Act consumes nearly half of the state general fund budget. To exclude evidence of constitutional revenue restrictions or appropriations to other essential state services would constrain this Court with an illogical and misleading view of the legislature's K–12 funding decisions.

STANDARD OF REVIEW

Motions *in limine* lie within a trial court's inherent authority and are an established means of "forestall[ing the] introduction of potentially prejudicial evidence." 6 David R. DeMuro, COLORADO METHODS OF PRACTICE § 8.8 at 368 (2d ed. 2001) (citing and quoting *Good v. A. B. Chance Co.*, 565 P.2d 217, 221 (Colo. App. 1977)). A trial court enjoys considerable discretion in determining the logical relevance of evidence. *E.g.*, *Paris ex rel. Paris v. Dance*, 194 P.3d 404, 409 (Colo. App. 2008). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401; *see also Gresh v. Balink*, 148 P.3d 419, 423 (Colo. App. 2006) ("The plain and commonly understood meaning of 'relevant' is that which rationally tends to persuade persons of the probability of an alleged fact."). "In the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous." *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006).

ARGUMENT

I. Plaintiffs injected TABOR and all of the General Assembly's appropriations into this case.

Plaintiffs contend TABOR's revenue restrictions present political difficulties that "have nothing to do with this case." (Pls.' Mot. *in Limine* at 7.) However, Plaintiffs stated otherwise in their complaint, alleging "[t]wo provisions in the Colorado constitution prevent the state and school districts from raising and expending funds necessary to establish and maintain a thorough and uniform system of free public schools: the Taxpayer's Bill of Rights (TABOR) . . . and the 'Gallagher Amendment.'" (Pls.' Compl. ¶ 176 at 38; *see also id.* ¶¶ 177–86 at 39–40.) More specifically, Plaintiffs allege "the state is effectively incapable of providing the level of funding necessary to fulfill the mandate of the Education Clause" (Pls.' Compl. ¶ 185 at 40), and "TABOR specifically precludes school districts from withdrawing from or refusing to participate in programs mandated by state or federal law" (Pls.' Compl. ¶ 186 at 40). Also, in their first claim for relief, Plaintiffs alleged TABOR and the Gallagher Amendment "are in irreconcilable conflict with and must yield to the substantive rights guaranteed by the Education Clause." (Pls.' Compl. ¶ 213 at 46.)

In support of their allegations, Plaintiffs have disclosed numerous expert witnesses to testify about the effects of TABOR on education funding. (Pls. Exp. Discls. at 6–8, 14, 23, 35–38; Pls.' 1st Supp. Exp. Discl. at 3–5.) For example, Carol Hedges has been disclosed as "a recognized expert on the effects of Colorado's TABOR amendment." (Pls. Exp. Discls. at 6.) According to Hedges, "[d]ecisions about changing how Colorado spends money are difficult . . . because of the many limitations on how dollars the state receives can be spent. Colorado's unique tax and expenditure limits compound the problem and severely restrict the discretionary authority of budget writers in Colorado." (Pls. Exp. Discls. at 7.) Thus, in both their complaint and expert disclosures, Plaintiffs themselves prove TABOR's revenue restrictions are relevant to the issues they bring before this Court.

Plaintiffs also injected the General Assembly's appropriations to other essential state services. Again, in their complaint, Plaintiffs allege "[t]he 1994 PSFA [Public School Finance Act] base funding amount was based upon historical school funding levels and political compromise and not on the basis of an analytical determination of the actual costs to provide a constitutionally adequate, quality education." (Pls.' Compl. ¶ 21 at 8.) In support of this allegation, Plaintiffs disclosed several experts to testify the base amount of per pupil funding in the School Finance Act was based on historical allocations rather than an adequacy determination (Pls. Exp. Discls. at 12–13, 31–33, 35–36.) Necessarily encompassed within Plaintiffs' allegations of "historical school funding levels" and "political compromise" are TABOR's revenue constraints and appropriations to other essential state services—many established in the Constitution. (*See generally* Defs.' 56(h) Mot. at 6–8; Defs.' Reply to Pls.' Resp. and Pl.-Intervs.' Opp. to Defs.' 56(h) Mot. at 4–6.)[1]

[1] Plaintiffs maintain the Constitution requires substantial levels of funding only to K–12 education and the judiciary. A comprehensive comparison of the various constitutional provisions is inappropriate and impractical at this time. Defendants note Plaintiffs' marginalization of the state institutions in article VIII, section 1 requires that "support" means something different from "maintain," as used in the Education

To defend against Plaintiffs' allegation that funding based on historical levels and political compromise is constitutionally irrational, Defendants should be allowed to introduce evidence that competing constitutional obligations and budgetary constraints have affected the legislature's education funding decisions. Indeed, Plaintiffs acknowledge the legislature's challenges through their expert disclosures. Carol Hedges summarizes that "[d]ecisions about changing how Colorado spends money are difficult . . . because so much state funding currently goes to six categories of basic services" (Pls. Exp. Discls. at 7). Designated expert witness Jack Pommer's disclosure states, "the increase in the state share of school funding did not hurt districts, it hurt other state services." (Pls. Exp. Discls. at 37.) Thus, again, Plaintiffs themselves prove the evidence they seek to exclude is relevant.

II. TABOR and all of the General Assembly's appropriations are relevant to rational basis review of the School Finance Act.

The legal standards governing this case render TABOR's revenue restrictions and the General Assembly's appropriations to other state services logically relevant. As outlined in Defendants' 56(h) Motion, to prevail, Plaintiffs and Plaintiff-Intervenors must establish beyond a reasonable doubt that the General Assembly's education funding decisions are not rationally related to the constitutional mandate of a through and uniform system of free public schools and protection of local control over instruction. (Defs.' 56(h) Mot. at 3–4). The legislature's appropriations to other essential state services as directed and limited by the Colorado Constitution are facts of consequence having a tendency to show the legislature has acted rationally when funding K–12 education. *See* CRE 401.

Plaintiffs contend the Supreme Court's *Lobato v. State* decision says everything this Court need know about the rational basis standard. However, *Lobato*'s summary of the rational basis standard is neither novel nor exhaustive; rather, the standard to be applied here is well established and outlined in numerous Colorado Supreme Court opinions. (Defs.' 56(h) Mot. at 3–4; Defs.' Reply to Pls.' Resp. and Pl.-Intervs.' Opp. to Defs.' 56(h) Mot. at 1.)

Moreover, the Supreme Court expressly directed this Court to "give significant deference to the legislature's fiscal and policy judgments." *Lobato v. State*, 218 P.3d 358, 374–75 (Colo. 2009). As discussed in Defendants' 56(h) Motion, such fiscal and policy judgments include what Plaintiffs dismiss as non-educational "political" decisions. (Defs.' 56(h) Mot. at 3–4, 7–8.) "It is the peculiar and exclusive province of the legislature, so far, at least, as the judiciary is concerned, to judge of the necessity or desirability from a political or economic stand-point of each and every act proposed." *In re Senate Res. Relating to S. Bill No. 65*, 21 P. 478, 479 (Colo. 1889). Indeed, the rational basis standard's presumption of constitutionality recognizes that "[t]he problems of government are practical ones and often justify, if not require, a rough accommodation of variant interests." *Dawson By and Through McKelvey v. Public Employees' Retirement Ass'n*, 664 P.2d 702, 708 (Colo. 1983) (citing *Mathews v. Lucas*, 427 U.S. 495 (1976)).

Clause. Dictionaries, however, define the two words interchangeably. *E.g.*, MERRIAM-WEBSTER ONLINE DICTIONARY (2011), *available at* http://www.merriam-webster.com/dictionary/.

In Colorado, there are many "variant interests," but as Plaintiffs' disclosed expert Carol Hedges summarizes, they can be categorized by funding share into six groups of essential services—K–12 education, higher education, health care, human services, prisons, and courts. (Pls. Exp. Discls. at 7.) With the exception of health care, each of these services is addressed in the Colorado Constitution. (Defs.' 56(h) Mot. at 7.) Because TABOR strictly limits revenue, each dollar allocated to one of these services means one less dollar is available for the others. Thus, when the General Assembly makes a K–12 education funding decision, it necessarily makes fiscal and policy judgments about other essential state services. Excluding such evidence would be both illogical and misleading. Contrary to Plaintiffs assertion, nothing in *Lobato* prevents this Court from considering the legislature's competing appropriations. While the Supreme Court explained its review was limited, it directed deference to legislative decision making as a limit on the depth of review. *Lobato*, 218 P.3d at 373 (citing *Lujan*, 649 P.2d at 1025). In no way did the Supreme Court suggest the breadth of review was limited to only educational fiscal and policy judgments. *See also Lujan*, 649 P.2d at 1023–24 (examining article XI, sections 3, 5, and 6 when determining whether portion of School Finance Act was rationally related to legitimate state purpose).

III. The Education Clause must be construed with the Constitution as a whole.

In addition to the rational basis standard, the rules of constitutional harmonization make TABOR and the General Assembly's appropriations to numerous state services relevant. As discussed in Defendants' 56(h) motion, "the Constitution, including all amendments thereto, must be construed as one instrument, and as a single enactment." *People v. Field*, 181 P. 526, 527 (Colo. 1919), *accord, e.g.*, *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004); *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 630 (Colo. 1968). This maxim precludes reading the Education Clause in isolation; rather, it must be construed in concert with TABOR and all other constitutional provisions, including the provision of state institutions in article VIII, section 1, higher education institutions in article VIII, section 5, and courts in article II, section 6 and article VI, sections 1, 10, and 18. Even if the Education Clause, when read alone, requires a certain level of appropriation the K–12 education system, the Constitution's other funding mandates must be considered as well. (*See generally* Defs.' 56(h) Mot. at 7.) And, constitutional harmonization means the level of all these allocations is constrained by the strict revenue limitations imposed by the subsequently enacted and superseding TABOR amendment. (*Id.*)

IV. Denying Plaintiffs' motion *in limine* will not vest the General Assembly with unfettered discretion.

Plaintiffs fear that "budget shortages" could defeat any challenge to the level of education funding, effectively vesting the legislature with "unfettered discretion" and rendering meaningless the "rights" recognized in *Lobato* (Pls.' Mot. *in Limine* at 4.) This concern misses the mark. The relevance of TABOR and the General Assembly's many appropriations is not dependent upon any budget shortage. Rather, as already discussed, it is the deferential rational basis standard and Colorado's unique constitution that draw this case well outside the Education Clause and legislative appropriations to just K–12 education. The issue is not that the General Assembly is fulfilling its obligations during an economic recession, but that the Constitution

mandates legislative attention to numerous essential state services while restricting the funds available for appropriation.

Moreover, there is no danger of vesting the General Assembly with unfettered discretion or trampling any rights. *Lobato* determined that Plaintiffs' claims are justiciable. 218 P.3d at 368–75. The Supreme Court did not say the Plaintiffs or anyone else have a right to a particular quality of education. *See id.* (*See generally* Defs.' 56(h) Mot. at 4–5.) This Court is charged with determining whether the General Assembly's education funding decisions are rationally related to the constitutional mandate of a through and uniform system of free public schools and protection of local control over instruction. That this review encompasses the entire Constitution and all legislative appropriations does not change the fact that the judiciary and not the legislature says what the law is. What Plaintiffs really fear is that the establishment and maintenance of a thorough and uniform system of free public schools is not the only legislative mandate in the Colorado Constitution.

V. Plaintiffs' reliance on inapplicable out-of-state cases is not persuasive.

Plaintiffs also point this Court to cases from other states, but their citations are not persuasive. In addition to involving different constitutions, none of the three cases from New Hampshire, New Jersey, and West Virginia directly concern motions *in limine* or relevance. In *Abbott v. Burke*, the magistrate actually denied a motion *in limine* similar to Plaintiffs' so that the New Jersey Supreme Court would have a complete record on the state's severe budget crisis. 2011 WL 1990554, at *37 (N.J. May 24, 2011). And, while *Abbott* did distinguish between constitutional mandates and statutory obligations, it did so in the context of the general appropriations clause in the New Jersey Constitution. *Id.* at **13–14. Unlike TABOR, which restricts state revenue, the New Jersey appropriations clause authorizes the legislature to modify or suspend statutes that raise some expectation of funding. *Id.* at *14 (citing cases). As already discussed, the competing appropriations at issue here are sourced in the Colorado Constitution—not merely statutes.

Randolph County Board of Education v. Adams somewhat similarly draws a line between constitutional mandates and financial hardship, but again under a very distinguishable set of facts. Finding free textbooks a part of the West Virginia Constitution's guarantee of a fundamental right to a free education, the court held unconstitutional a local school board's decision to charge a book user fee to non-needy students. *Randolph*, 467 S.E.2d 150, 154, 159, 163–64 (W.Va. 1995). *Randolph*, therefore, concerned a local district's rather than state-level financial hardship, and there is no indication such hardship was an effect of the state constitution. Finally, *Claremont School District v. Governor* is even less applicable. *Claremont* involved a dispute about education standards, and the language cited by Plaintiffs comes from a section of the opinion that struck down part of the state accountability statute providing a one-year leniency period for school districts with sudden financial emergencies, such as factory closures, before they face penalties for failure to meet statewide requirements: "[t]he State may not take the position that the minimum standards form an essential component of the delivery of a constitutionally adequate education and yet allow for the financial constraints of a school or school district to excuse compliance with those very standards." 794 A.2d 744, 755 (N.H. 2002). This conclusion is very different from the one Plaintiffs proffer.

VI. The logical relevance of TABOR and the General Assembly's appropriations is not overborne by any confusion of the issues or waste of time.

Plaintiffs' bare assertion of confusion holds no obvious substance in this non-jury trial to the court and cannot be further answered.[2] *See, e.g.*, *Liggett*, 135 P.3d at 733. Plaintiffs more specifically complain evidence concerning TABOR and the General Assembly's appropriations will "needlessly waste time in an already time-consuming trial." (Pls.' Mot. *in Limine* at 7.) As already discussed, however, Plaintiffs inject these issues into this case through their complaint and expert disclosures. And, TABOR and the General Assembly's appropriations to other essential state services are logically relevant to whether the legislature's K–12 funding decisions are rational as well as determining the scope of the Education Clause. Precluding Defendants from presenting such evidence would unfairly prejudice their defense by disallowing a complete and accurate explanation of the legislature's actions.

CONCLUSION

Plaintiffs' motion *in limine* should be denied. The targeted evidence and argument is logically relevant and should not be excluded. Plaintiffs themselves prove relevance by injecting TABOR and the legislature's appropriations through their complaint and expert disclosures. Under the governing rational basis standard and rules of constitutional harmonization, TABOR and all of the General Assembly's appropriations are facts of consequence that have a tendency to show the legislature has acted rationally when funding K–12 education. Plaintiffs' fear of unfettered discretion misses the mark, and their reliance on distinguishable out-of-state cases is not persuasive. Plaintiffs should not be heard to complain that evidence regarding TABOR and the General Assembly's appropriations will waste time because they injected the issues into this case. To exclude evidence of constitutional revenue restrictions or appropriations to other essential state services would constrain this Court with an illogical and misleading view of the legislature's K–12 funding decisions.

[2] Any attempt by Plaintiffs to expand their assertion in a reply brief would be tardy and should not be considered. *Cf., e.g.*, *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (refusing to address issue raised for first time in defendant's reply brief); *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 718 (Colo. App. 1991) (refusing to review claim briefed inadequately).

DATED: July 1, 2011

JOHN W. SUTHERS
Attorney General

s/ Jonathan P. Fero
NANCY J. WAHL, 31890*
First Assistant Attorney General
ANTONY B. DYL, 15968*
Senior Assistant Attorney General
CAREY TAYLOR MARKEL, 32987*
Senior Assistant Attorney General
NICHOLAS P. HEINKE, 38738*
Assistant Attorney General
JONATHAN P. FERO, 35754*
Assistant Attorney General
ERICA WESTON, 35581*
Assistant Attorney General

ATTORNEYS FOR DEFENDANTS
*Counsel of Record
Original signature of Jonathan P. Fero is on file at the Office of the Colorado Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF NON-EDUCATION APPROPRIATIONS AND TABOR PROVISIONS** upon all parties herein by electronically filing through LexisNexis courtlink or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 1st day of July, 2011 addressed as follows:

David Hinojosa, Esq.
Marisa Bono, Esq.
Rebecca M. Couto, Esq.
Mexican American Legal Defense and Education Fund (MALDEF)
110 Broadway, Ste. 300
San Antonio, Texas 78205
Attorneys for Plaintiff-Intervenors Armandina Ortega, et al.
(via electronic-mail and U.S. Mail)

Henry Solano, Esq.
DEWEY & LeBOEUF
4121 Bryant St.
Denver, Colorado 80211
Attorney for Plaintiff-Intervenors Armandina Ortega, et al.

Alexander Halpern , Esq.
Alexander Halpern LLC
1426 Pearl Street, Suite 420
Boulder, Colorado 80302
Attorney for Anthony Lobato, et al.

Kathleen J. Gebhardt, Esq.
Kathleen J. Gebhardt LLC
1900 Stoney Hill Road
Boulder, Colorado 80305
Attorney for Anthony Lobato, et al.
(via electronic-mail and U.S. Mail)

Kenzo Kawanabe, Esq.
Terry R. Miller, Esq.
Geoffrey C. Klingsporn, Esq.
Rebecca J. Dunaway, Esq.
Daniel P. Spivey, Esq.
DAVIS, GRAHAM & STUBBS, LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Attorneys for Anthony Lobato, Denise Lobato, Taylor Lobato, Alexa Lobato, Aurora Joint School District No. 28, Jefferson County School District, Colorado Springs School District, Monte Vista and Alamosa School District

Kyle C. Velte, Esq.
REILLY POZNER, LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
School District No. 1, Del Norte Consol. School District No. C-7, Moffat School District No. 2, and Mountain Valley School District No. Re 1

Ryann B. MacDonald, Esq.
(via email @ RMacDonald10@law.du.edu)

Jess A. Dance, Esq.
Zane Gilmer, Esq.
PERKINS COIE, LLP
1899 Wynkoop Street, Suite 700
Denver, Colorado 80202
Attorney for Plaintiffs Sanford School District 6J, North Conejos

David W. Stark, Esq.
Joseph C. Daniels, Esq.
Sera Chong, Esq.
FAEGRE & BENSON LLP
1700 Lincoln Street, Suite 3200
Denver, Colorado 80203
Attorneys for Plaintiffs Jessica Spangler,

School District RE-1J, South Conejos School District RE-10, and Centennial School District No. R-1

Kimberley D. Neilio, Esq.
GREENBERG TRAURIG, LLP
1200 Seventeenth Street, Suite 2400
Denver, Colorado 80202
Attorney for Plaintiff Pueblo School District 60, County of Pueblo, Colorado

Jessica E. Yates, Esq.
Lisa A. Decker, Esq.
SNELL & WILMER LLP
One Tabor Center, Suite 1900
Denver, Colorado 80202
Attorney for Plaintiffs Alexandria, Amber, Ari, Ashley and Lillan Leroux

Herbert Conboy, Victoria Conboy, Terry Hart, Kathy Howe-Kerr, Larry Howe-Kerr, John T. Lane, Jennifer Pate, Blance J. Podio, and Robert L. Podio

Alyssa K. Yatsko, Esq.
HOLLAND & HART, LLP
555 Seventeenth St. Suite 3200
Denver, Colorado 80201-8749
Attorney for Jefferson County School District No. R-1

Elizabeth J. M. Howard, Esq.
THE HARRIS LAW FIRM, P.C.
1125 Seventeenth Street, Suite 1820
Denver, Colorado 80202
Attorneys for Plaintiffs Teresa Wrangham, Debbie Gould, and Stephen Topping

s/ Jeannine Moore
Jeannine Moore, Paralegal
Original Signature on file at the Office of the Colorado Attorney General